

U.S. Department of Labor

Board of Alien Labor Certification Appeals
800 K Street, NW, Suite 400-N
Washington, DC 20001-8002

(202) 693-7300
(202) 693-7365 (FAX)

Issue date: 25Sep2001

CASE NO.: 2000 - INA - 313

In the Matter of:

COTTON L.A.,
Employer,

on behalf of

LOURDES GALLEG0, Alien.

Appearance: Wade J. Chernick, Esq.
Encino, CA

Certifying Officer: Pandora Wong
San Francisco, CA

Before: Holmes, Vittone, and Wood

JOHN C. HOLMES
Administrative Law Judge

DECISION AND ORDER

This case arose from an application for labor certification on behalf of Alien Lourdes Gallego ("Alien") filed by Cotton L.A. ("Employer") pursuant to § 212(a)(5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1182(a)(5)(A) (the "Act"), and the regulations promulgated thereunder, 20 C.F.R. § 656. The Certifying Officer ("CO") of the United States Department of Labor, San Francisco, California, denied the application, and the Employer and the Alien requested review pursuant to 20 C.F.R. § 656.26.

Under § 212(a)(5) of the Act, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor may receive a visa if the Secretary of Labor ("Secretary") has determined and certified to the Secretary of State and to the Attorney General that 1) there are not sufficient workers who are able, willing, qualified, and available at the time of the application and at the place where the alien is to perform such labor, and 2) the employment of the alien will not adversely affect the wages and working conditions of the U.S. workers similarly employed.

Employers desiring to employ an alien on a permanent basis must demonstrate that the requirements of 20 C.F.R. § 656 have been met. These requirements include the responsibility of the Employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means in order to make a good faith test of U.S. worker availability.

The following decision is based on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File ("AF"), and any written argument of the parties. 20 C.F.R. § 656.27(c). All parties were served with a Notice of Docketing and Order Requiring Statement of Position or Legal Brief on October 12, 2000; they were notified that all parties had twenty-one (21) days to submit a statement or brief, and such was required if a ground of appeal was not stated in the request for review by the Board of Alien Labor Certification Appeals (the "Board").

Statement of the Case

Employer seeks alien labor certification to allow it to fill the position of "Accountant" in its Los Angeles, California, garment business. The duties of the position are described as follows:

Prepares financial statements and accounting reports for submission to management. Ascertains the proper amounts of the company's assets (accounts receivable, inventory, fixed assets and cash) and liabilities. Updates and advises management on accounting/tax ramifications. Renders budgetary cash flow and inventory control projections. Reports to management concerning the scope of all findings onto computer by using DAC-EASY for subsequent review by management.

Four years of college were required, with a Bachelor's of Science in either Accounting or Business Administration. Two years of experience in the offered job were also required. Also listed as necessities for the performance of the job duties were prior experience in cash flow and budget projections, inventory control, internal auditing and financial statement analysis. The position paid \$33,428 per year. (AF-278).

The application was first submitted in March of 1995, but was remanded in December of 1996 because the job as listed showed a combination of duties and contained restrictive requirements. Employer responded to the State of California's inquiries in March of 1997, requesting that the file be forwarded, to the Department of Labor, amending the job description in some respects, and offering explanation of many of the requirements.

A Notice of Findings ("NOF") was issued on May 27, 1997 which proposed to deny labor certification on several grounds. First, the CO noted that the inclusion of several specific software packages in the job description was unduly restrictive. Such could be corrected through deletion of the requirements or offering a business necessity justification. The CO also found that the job appeared to combine the duties of Accountant and Budget Accountant. Employer could revise the job duties, justify the combination as a business necessity, or show that the combination was normal and customary. Third, the CO found that six U.S. workers were rejected for unlawful reasons. Specific, lawful reasons for the rejections were requested to rebut this finding. Finally, the CO found that the Employer had failed to show a good faith recruiting effort in the cases of two U.S. applicants. Contacts with these applicants were documented. (AF 272-276).

Employer's Rebuttal was filed on July 1, 1997. This consisted of a seven page letter from Employer which addressed each cited deficiency. Employer agreed to delete the software requirement, and agreed to re-advertise the position. Employer also pointed out that because the original advertisement had not mentioned the software, and because experience with it had not been the basis for the rejection of any workers, re-advertisement was not strictly necessary. The combination of duties was justified based upon business necessity and economic realities. Explanations of the rejections of each applicant were also noted. (AF 264-271).

The CO remanded the case for re-advertising on July 25, 1997. (AF 260). Employer again posted and advertised the position, and reported its results to the State of California. This included receipts from certified mail. (AF 156-259). The file was then transmitted to the Department of Labor, and the CO issued an NOF on July 24, 1998 which proposed to deny certification based upon a lack of good faith recruitment. Efforts with respect to five U.S. applicants were cited. Employer was requested to submit evidence that contact had been made and that it was done as soon as possible. (AF 261-263).

Employer's second Rebuttal consisted of an August 28, 1998 letter. The letter was three pages in length, and was accompanied by three copies of envelopes from the State of California. Employer stated that three applicants responded to certified letters they were sent. One had found another position already, and two wanted more money than the position paid. The other two individuals were also sent certified letters, but did not contact the Employer. No telephone calls were placed to these applicants, as it was Employer's position that given the number of applicants and the mailing of a certified letter, good faith had been shown. "[T]he onus should have been placed on the applicant to follow-up his/her initial interest with a phone call, as was invited in the letter sent to the person." (AF 148-154).

A Final Determination was issued on June 3, 1999 denying labor certification. The Rebuttal was found to be insufficient with regard to all five individuals. Four of the receipts for certified mail were not signed, and the efforts described (sending letters) were not sufficient. The CO noted that a similar deficiency had been noted in the initial recruitment for the position, and that the letter the applicants were sent may have had a chilling effect, as it stated the offered salary and denied all other benefits. (AF 146-147).

Employer appealed the CO's denial on July 1, 1999. (AF 3-145) This was treated as a request for reconsideration, which was denied on August 25, 1999. (AF 2). Employer then specified that the request was for administrative review by the Board, and the file was forwarded accordingly. (AF 1).

Findings of Fact and Conclusions of Law

The employer bears the burden in labor certification both of proving the appropriateness of approval and ensuring that a sufficient record exists for decision. 20 C.F.R. § 656.2(b); Giaquinto Family Restaurant, 1996-INA-64 (May 15, 1997); Carlos Uy III, 1997-INA-304 (March 3, 1999)(*en banc*).

Although the regulations do not explicitly state a "good faith" requirement in regard to post-filing recruitment, such a good faith requirement is implicit. H.C. LaMarche Enterprises, Inc., 1987-INA-607 (Oct. 27, 1988). Actions by the employer which indicate a lack of a good faith recruitment effort, or actions which prevent qualified U.S. workers from further pursuing their applications, are thus a basis for denying certification. In such circumstances, the employer has not proven that there are not sufficient United States workers who are "able, willing, qualified and available" to perform the work. 20 C.F.R. § 656.1.

Here, the Employer sent a certified letter to each of the five individuals mentioned in the second NOF. Signed receipts accompany all five mailings. Further, all of the certified letters show that they were mailed to the applicants within a few days of the referral from the State of California. The longest delay was 13 days; four others were sent out 6 and 8 days after the referral. We find that these contacts were timely, and that there was no excessive delay which might give rise to a presumption of a lack of good faith.

Three of the cited individuals responded to these letters. Two informed the Employer that the salary mentioned in the recruitment letter was too low, and that they were not interested. A third told the Employer that she had obtained another job, and was no longer interested. With respect to these three individuals, we find that the Employer has rebutted the cited deficiency. The CO apparently bases a part of the rejection of Employer's Rebuttal upon the recruiting letter sent to the U.S. applicants. In the Final Determination, the CO raised a problem with that letter, saying that because it specified the salary and indicated that no other benefits, such as health care were offered, there was a chilling effect. No mention of this was made in the NOF, and it is improper for the CO to raise the issue as an additional grounds in the FD or to cite previously unmentioned evidence. Marathon Hosiery Co., Inc., 1988-INA-420 (May 4, 1989)(*en banc*); Shaw's Crab House, 1987-INA-714 (Sept. 30, 1988)(*en banc*). Such action deprives the Employer of due process by preventing a meaningful and complete response to the CO grounds for denial.

The other two U.S. applicants were rejected because they did not respond to Employer's letter, and were hence declared uninterested. Reasonable efforts to contact qualified U.S. applicants may, in some circumstances, require more than a single type of attempted contact. Diana Mock, 1988-INA-255 (Apr. 9, 1990). Employer maintains that, given the large number of applicants, it demonstrated sufficient good faith by sending a certified letter, and by confirming that such letter was delivered. We agree. A total of seventeen referrals were obtained, and the Employer has provided proof that certified letters were sent and received.

We recognize that good faith issues were raised in the first round of recruitment, and that MCT the content of the recruitment letter in this case may have had a chilling effect, but these concerns are not sufficient to overcome the evidence of recruitment efforts provided by the Employer.

ORDER

Based on the foregoing, the Final Determination of the CO is reversed, and labor certification is granted.

For the Panel:

A
John C. Holmes
Administrative Law Judge

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within 20 days from the date of service a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure and maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

**Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002**

Copies of the petition must also be accompanied by a written statement setting forth the date and manner of that service. The petition must specify the basis for requesting review by the full Board, with supporting authority, if any, and shall not exceed five double-spaced typed pages. Responses, if any, must be filed within ten days of service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of a petition the Board may order briefs.